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Supreme Court of the United States

OCTOBER TERM, 1963

No. 663

CITY OF NEW ORLEANS, ET ALS.,

Appellants,

versus

EVANGELINE BARTHE, ET ALS.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division

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STATEMENT AS TO JURISDICTION

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On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division

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STATEMENT AS TO JURISDICTION

Appellants, the City of New Orleans; Victor H. Schiro, Mayor of the City of New Orleans; Lester J. Lautenschlaeger, Director, Department of Recreation of the City of New Orleans; Joseph Giarrusso, Superintendent of Police of the City of New Orleans; New Orleans Parkway and Park Commission; Felix Seeger, Superintendent of the New Orleans Parkway and Park Commission; Herman E. Farley, Wilson S. Callender, A. L. Norris, Max Scheinuk, Herbert Jahncke, Lester J. Lautenschlaeger, L. A. Malony, Sr., J. P. Gentilich, M. E. Polson, Mrs. Joe W. Brown and Mrs. S. M. Blackshear, members of the New Orleans Park and Parkway Commission, appeal from a judgment of the United States District Court for the Eastern District of Louisiana, en-

tered on September 27th, 1963, declaring unconstitutional Louisiana Statutes Annotated, Revised Statutes, Section 33:4558.1, and enjoining the appellants, and all persons who are acting or may act in concert with them, from enforcing the said provisions of the Revised Statutes of Louisiana. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Eastern District of Louisiana issued on July 31st, 1963, and the judgment and preliminary injunction issued on September 27th, 1963. This opinion and preliminary injunction are unreported. A copy of the opinion and preliminary injunction complained of are attached hereto in Appendix "A".

JURISDICTION

This appeal is as to the judgment of the United States District Court for the Eastern District of Louisiana, specially constituted under 28 U.S.C. Sec. 2281 and 28 U.S.C. Sec. 2284 upon the complaint of Evangeline Barthe, a minor, by Edwin Barthe, her father and next friend, and others, seeking an interlocutory and permanent injunction to have declared unconstitutional Section 33:4558.1 of the Revised Statutes of the State of Louisiana of 1950, as amended. and to enjoin and restrain the various defendants from enforcing this Section of the Revised Statutes of Louisiana, as same are repugnant to the privileges and immunities of citizens of the United States, due process of law and the equal protection of the Laws Clauses of the Fourteenth Amendment of the United States Constitution and the rights and privileges secured

by Sections 1981 and 1983 of Title 42, United States Code.

The decree appealed from was made and entered on September 27th, 1963. Notice of Appeal was filed in the United States District Court for the Eastern District of Louisiana on October 25th, 1963.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of by the provisions of 28 U.S.C. § 1253 and 2101(b).

The following decisions are submitted as sustaining the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Palmetto Fire Insurance Company vs. Conn.*, 272 U.S. 295, 47 S. Ct. 88, 71 L. Ed. 243; *St. John vs. Wisconsin Employment Relations Board*, 340 U.S. 411, 71 S. Ct. 375, 95 L. Ed. 386.

In the opinion of the District Court, see p. 18 of Appendix "A" attached, there was a question in the Court's mind as to whether this matter should have been tried by the District Court sitting as a three judge Court or whether it should have been heard by the District Judge to whom the matter was allotted. The Section of the Revised Statutes of Louisiana of 1950, as amended, which is the subject of this litigation is R.S. 33:4558.1. This Section of the Revised Statutes of Louisiana of 1950, as amended, was adopted into law as Act No. 14, of the Regular Session of the Louisiana Legislature of 1956. Under Section 1 of the Act No. 14 of the Regular Session of the Louisiana Legislature of 1956 it is provided as follows:

> "Section 1. All public parks, recreation centers, playgrounds, community centers and other such facilities at which swimming, dancing, golfing, skating or other recreational activities are conducted

> shall be operated separately for members of the white and colored races. This shall not preclude mixed audiences at such facilities, provided separated sections and restroom facilities are reserved for members of white and colored races. **This provision is made in the exercise of the State's police power and for the purpose of protecting the public health, morals and the peace and good order in the state and not because of race."**

It is submitted that the doctrine of *Bailey vs. Patterson*, 369, U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512, is not applicable in the instant matter. This Court in *Bailey* in interpreting the provisions of 28 U.S.C. 2281 established that where "prior decisions make frivolous any claim that a state statute on its face is not unconstitutional" a three judge District Court is not required. The statutes before the Court in *Bailey* were Mississippi laws as to segregation of the races in transportation facilities in interstate or intra-state flow of commerce. These Mississippi statutes were apparently no longer a litigable issue because of the holding of this Court in *Morgan vs. Commonwealth of Virginia*, 328 U.S. 373, *Gayle vs. Browder*, 352 U.S. 903, and, *Boynton vs. Virginia*, 364 U.S. 454. But the Louisiana Statute presently before this Court, that is, Section 1 of Act 14 of the Regular Session of 1956 of the Louisiana Legislature provides for the segregation of the races in public recreational activities in the "exercise of the State's police power and for the purpose of protecting the public health, morals and the peace and good order in the state and not because of race". This provision of the Louisiana Statute presently before this Court has not been passed upon by this Court or the other Courts of the United States nor has a similar statute of another State been finally passed upon by this Court or the other Courts of the United States.

This Court has jurisdiction to review the judgment below on direct appeal.

STATUTES INVOLVED

The Statutes involved in these proceedings is Section 33:4558.1 of the Revised Statutes of Louisiana of 1950, as amended, which provision of the Statutes was enacted into law by Act No. 14 of the Regular Session of the Louisiana Legislature of 1956 and is carried at pages 41, 42, and 43 of the Acts, State of Louisiana, Regular Session 1956. These provisions of the Statutes provide as follows:

> 33:4558.1 Separation of white and colored races. A. All public parks, recreation centers, play grounds, community centers and other such facilities at which swimming, dancing, golfing, skating or other recreational activities are conducted shall be operated separately for members of the white and colored races. This shall not preclude mixed audiences at such facilities, provided separated sections and rest room facilities are reserved for members of white and colored races. This provision is made in the exercise of the state's police power and for the purpose of protecting the public health, morals and the peace and good order in the state and not because of race.
>
> B. "Public" parks and other recreational facilities as used herein shall mean any and all recreational facilities operated by the State of Louisiana or any of its parishes, municipalities or other subdivisions of the state.
>
> C. Any person, firm or corporation violating any of the provisions of this Section shall be deemed guilty of a misdemeanor and upon conviction therefor by a Court of competent jurisdiction for each such violation shall be fined not less than five hundred dollars nor more than one thousand dollars,

or sentenced to imprisonment in the parish jail not less than ninety days nor more than six months, or both, fined and imprisoned as above, at the discretion of the Court. Acts 1956, No. 14, § 1-3."

QUESTIONS PRESENTED

The principal question presented is whether the provisions of the Revised Statutes of Louisiana of 1950, R.S. 33:4558.1, providing for the segregation of the races in all public parks, recreation centers, playgrounds, community centers and other such facilities at which swimming, dancing, golfing, skating or other recreational activities are conducted, and also providing: that mixed audiences shall not be precluded at such facilities, provided separated sections and rest room facilities are reserved for members of the white and colored races, unconstitutional on its face or is the law valid and pursuant to the police powers of the State of Louisiana for the purpose of protecting the public health, morals and the peace and good order in the State.

The second question presented is the validity of the injunction rendered against the various defendants-appellants.

The third question presented is whether the plaintiffs have shown that the statute involved has been enforced against them or that they represent the class they purport to represent so that the proper basis has been laid for a class action.

STATEMENT OF THE CASE

This is an action by various negro minors through their parents and next friend and by these parents also, purporting to be a class action on behalf of themselves and the other negro persons of the City of New Orleans,

for a declaratory judgment and for an injunction declaring L.S.A.-R.S. 33:4558.1 unconstitutional and to enjoin the defendants from enforcing this provision of the Revised Statutes of the State of Louisiana of 1950, as amended.

On or about June 8, 1962, approximately 1,000 negroes, including the some dozen adults who brought this action, submitted for themselves and on behalf of their children a petition, to various officers, elected and appointed, of the City of New Orleans, requesting the desegregation of certain facilities and programs operated by the New Orleans Recreation Department, an agency of the City of New Orleans. The same petition was also submitted to the New Orleans Parkway and Park Commission, another agency of the City of New Orleans. When the various officials to whom this petition was addressed did not desegregate the facilities and programs as requested this suit for a declaratory judgment and injunction was instituted.

THE QUESTIONS ARE SUBSTANTIAL

The primary question involved in this matter is the right of the State of Louisiana under the police powers of the State to regulate recreational activities in public parks, recreation center, play grounds and community centers, so as to require the races to be separated, each to its separate park, recreation center, etc., or to separated sections of the same park, recreation center, etc. The Legislature premised such action on the State's police power for the purpose of protecting the public health, morals and the peace and good order in the state and not because of race.

The State of necessity must be permitted to protect the lives and safety of all its citizens. Reasonable police

regulations having for their purpose the protection of life and property have consistently been permitted by this Court as valid powers of the State. *Price vs. Illinois*, 238 U.S. 446, 35 S. Ct. 892, 59 L. Ed. 1400; *Armour & Co. vs. North Dakota*, 240 U.S. 510, 36 S. Ct. 440, 60 L. Ed. 771; *Miller vs. Strahl*, 239 U.S. 426, 36 S. Ct. 147, 60 L. Ed. 364; *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40, 46 S. Ct. 384, 70 L. Ed. 818; *Wilson vs. Eureka City*, 173 U.S. 32, 19 S. Ct. 317, 43 L. Ed. 603. The State, of necessity, must possess such regulatory powers. In the instant matter the State has felt that it is to the best interests of the citizens of the State that in recreational facilities the races be segregated. This is because such presence of inter-mingled racial groups in recreational activities would seriously impair the public health, morals and the peace and good order in the State. If such a presence of intermingled groups would of necessity result in such consequences the State has a right to prevent such harmflul effects to the public. This Court has consistently held since the *Brown* decision various segregation laws from various States to be unconstitutional where the separation was based upon color. No authorities need be cited to support this proposition. But the important question here is whether the Statute involved herein is one directed at separation of the races in public facilities for that reason only or whether the separation of the races is only incidental to the greater burden of protecting life, health and property. It is submitted that the statute specifically stated that the purpose of the separation was directed at the preservation of public health, morals and peace and good order and not because of race. Police regulations must of necessity operate against a class. But it is submitted that a class may be regulated where the primary purpose is the protection of public health, morals and peace and good order in the

State, but where as a consequence a class is required to submit to certain regulations. Doctors may be required to be licensed where carpenters may not be required to be licensed. The purpose of the Statute is not to require one class to submit to regulations for employment where another class is not regulated. The primary purpose of licensing physicians is to protect the health of the public. It is only incidental that this class is licensed and required to submit to a regulation not binding on another class of workers.

It is, therefore, submitted that the instant statute is valid under the police powers inherent in the Legislature of the State of Louisiana.

The second question presented is the question as to whether the injunction should have issued in this matter against the appellants together with the declaratory judgment. In *Clark, et al. vs. Thompson, et al.*, (1962) 206 F. Supp. 539, affirmed by the 5th Circuit Court of Appeals, 313 F. 2d 637, a similar statute and the question of injunctive relief was passed on by the Court in the following language:

> "A desire for a sweeping injunction cannot relieve plaintiffs of the obligation to comply with the general rule that they must present facts sufficient to show that their individual needs require injunctive relief. *Bailey vs. Patterson*, ... U.S. ....., 7 L. Ed. 2d 512; *McCabe vs. Atchinson T. & S. F. Ry. Co.*, 235 U.S. 151, 59 L. Ed. 169; *Brown vs. Board of Trustees*, U.S.C.A. 5th, 187 F. 2d 20; and *Kansas City, Mo., et al. vs. Williams, et al.*, U.S.C.A. 8th, 205 F. 2d 47." • • •
>
> "The individual defendants in this case are all outstanding, high class gentlemen and in my opinion will not violate the terms of the declaratory judgment issued herein. They know now what the

> law is and what their obligations are, and I am definitely of the opinion that they will conform to the ruling of this Court without being coerced so to do by an injunction. The City of Jackson, a municipality, of course is operated by some of these high class citizens. I am further of the opinion that during this period of turmoil the time now has arrived when the judiciary should not issue injunctions perfunctorily, but should place trust in men of high character that they will obey the mandate of the Court without an injunction hanging over their heads."
>
> "Neither the facts in the present case nor the exigencies of the situation are sufficient or urgent enough to require the granting of an injunction."

In the instant matter it is submitted by the appellants that no need for the injunction to issue has been shown. The appellant-defendants are high class men and women and there has been no showing that they would not obey the declaratory judgment of the Court construing this statute. There is no showing that such conditions existed which require the urgency of the injunctive processes of the Court in order to secure compliance by the appellants with the mandate of the Court.

Third, the question is presented as to whether there has been the foundation laid by the plaintiffs to show that this is a proper class action. The plaintiff majors are approximately one dozen of the adult negroes of the City of New Orleans of a population of several thousand negro citizens. That the vast remainder of the negro citizens of this community desired such a class action has not been shown. And such a burden of proof rested on the plaintiffs. This was pointed out by the Court in *Clark, et al. vs. Thompson, et al., supra,* as follows:

> "The burden of proof on this issue was on the

plaintiffs. *Oppenheimer vs. F. J. Young & Co.*, D.C. N.Y., 3 F.R.D. 220. The plaintiffs failed to meet this burden. A class action cannot be maintained when the interests of the plaintiffs are antagonistic to and not wholly compatible with the interests of those whom they purport to represent. *Flaherty vs. McDonald*, D.C. Cal., 178 F. Supp. 544; *Redmond, et al. vs. Commerce Trust Co.*, C.C.A. 8th, 144 F. 2d 140; *Brotherhood of Locomotive Firemen and Enginemen vs. Graham, et al.*, C.C.A. Dist. of Columbia, 175 F. 2d 802; *Kentucky Home Mut. Life Ins. Co. vs. Duling*, C.C.A. 6th, 190 F. 2d 797; *Advertising Specialty National Association vs. Federal Trade Commission*, C.C.A. 1st, 238 F. 2d 108; and *Troup vs. McCart*, C.C.A. 5th, 238 F. 2d 289."

It is submitted, therefore, that the Statute in question is valid under the police powers of the State of Louisiana, but, even if invalid there has been no showing that this is a proper class action or that the injunctive processes of the Court had to be resorted to in order to secure compliance with the declaratory judgment of the Court.

Respectfully submitted,

ALVIN J. LISKA,
City Attorney

ERNEST L. SALATICH,
Assistant City Attorney,

Attorneys for Appellants,
Room 2W23—City Hall,
New Orleans, Louisiana.

CERTIFICATE

I, Alvin J. Liska, City Attorney for the City of New Orleans and a member of the Supreme Court of the United States, do hereby certify that on this date, I served copies hereof, on all parties in this cause, by mailing a copy in a duly addressed envelope, with postage paid, to counsel of record for said parties.

This ..... day of ....., 1963.

ALVIN J. LISKA

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

NO. 12968
CIVIL ACTION

EVANGELINE BARTHE, A MINOR, BY EDWIN BARTHE, HER FATHER AND NEXT FRIEND, ET ALS.,

Plaintiffs,

versus

CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION OF THE STATE OF LOUISIANA, ET ALS.,

Defendants.

JUDGMENT

This cause came on for hearing on application of plaintiffs for a declaratory judgment and a preliminary injunction. The Court, having carefuliy considered the arguments of counsel and the record made in this cause, and being of the opinion that plaintiffs should be granted the relief prayed for in their complaint and for the written reasons formerly entered by this Court on July 31, 1963;

IT IS ORDERED, ADJUDGED AND DECREED that L.S.A.-R.S. 33:4558.1, of the State of Louisiana is unconstitutional insofar as it attempts to prohibit the plaintiffs, as individuals, and all other Negro citizens of

the City of New Orleans, from the use and enjoyment of public parks, recreation centers, playgrounds, community centers, recreational facilities and programs under the direction and administration of the defendants or either of them in the same manner and under the same terms and conditions as white residents of the City of New Orleans.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that:

THE CITY OF NEW ORLEANS;

VICTOR H. SCHIRO, individually and as Mayor of the City of New Orleans;

LESTER J. LAUTENSCHLAEGER, individually and as Director, Department of Recreation of the City of New Orleans;

JOSEPH GIARRUSSO, individually and as Superintendent of Police of the City of New Orleans;

NEW ORLEANS PARKWAY AND PARK COMMISSION:

FELIX SEEGER, Superintendent of the New Orleans Parkway and Park Commission;

HERMAN E. FARLEY, WILSON S. CALLENDER, A. L. NORRIS, MAX SCHEINUK, HERBERT JAHNCKE, LESTER J. LAUTENSCHLAEGER, L. A. MALONY, SR., J. P. GENTILICH, M. E. POLSON, MRS. JOE W. BROWN and MRS. S. H. BLACKSHEAR, individually and as members of the New Orleans Park and Parkway Commission,

their officers, agents, servants, employees and attorneys, and their successors in office, and those in concert with them who shall receive notice of this order, be, and they are, hereby restrained and enjoined from enforcing and

applying the provisions of L.S.A. R.S. 33:4558.1, of the State of Louisiana, and from acting under its force, sanction and authority in denying plaintiffs and other Negroes similarly situated, the use and enjoyment of public parks, recreation centers, playgrounds, community centers, recreational facilities and programs under their direction and administration, or under either of their direction and administration, in the same manner and under the same terms and conditions as white residents of the City of New Orleans.

Jurisdiction of these causes is retained for the purpose of giving full effect to this judgment and for the purpose of making such further orders and decrees, or the taking of such further action, if any, as may become necessary and appropriate to carry out and enforce the jurgment of this Court.

The preliminary injunction shall become effective upon the furnishing by plaintiffs of a bond in the sum of $500.00 conditioned as provided by law.

New Orleans, Louisiana, September 27, 1963.

(signed) John Minor Wisdom

UNITED STATES CIRCUIT JUDGE

(Signed) HERBERT W. CHRISTENBERRY

UNITED STATES DISTRICT JUDGE

(SIGNED) ROBERT A. AINSWORTH, JR.

UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

NO. 12968
CIVIL ACTION

EVANGELINE BARTHE, a minor, by EDWIN BARTHE, her father and next friend et als.
Plaintiffs,

versus

CITY OF NEW ORLEANS, a Municipal Corporation of the State of Louisiana, et als.
Defendants.

Present:

Attorneys for Plaintiffs:
Ernest N. Morial
A. P. Tureaud

Attorneys for Defendants:
Alvin J. Liska
Ernest L. Salatich

Before WISDOM, Circuit Judge, and CHRISTENBERRY and AINSWORTH, District Judges.

The plaintiffs in this action are adult Negro residents of New Orleans. For themselves and their children, and for other Negroes in New Orleans and their children, they petition for the desegregation of city-owned or operated parks and other recreational facilities.

The City of New Orleans has an extensive recreational and cultural program for its citizens, children and grownups. It is a model program under the direction of the New Orleans Recreation Department (NORD), which has an operating budget of $685,000 for this year. In great part, NORD's success is attributable to the imagi-

nation, energy and efficiency of Mr. Lester J. Lautenschlaeger, who has been the unpaid Director of the Department since it was established twelve or fifteen years ago.

The evidence is undisputed that the playgrounds, community centers, other public facilities and NORD's program are segregated.[1] This policy is practiced under the Louisiana Anti-Mixing Statute, LSA-RS 33:4558, as well as by long-standing custom. The evidence is also undisputed that the playgrounds and recreational facilities for Negroes are by no means equal to those available to white persons. There are only 19 Negro playgrounds as against 100 white playgrounds.

"It is no longer open to question that a State may not constitutionally require segregation of public facilities." *Johnson v. Virginia*, 1963, 372 U.S. 61, S. Ct. , L. Ed. 2d . To the extent that the City relied on the Louisiana Statute, LSA-RS 33:4558, the City relied on law unconstitutional on its face.

Nor can a City by ordinance, policy or custom maintain segregated facilities. On facts similar to those in this case, the Supreme Court recently held that the City of Memphis must immediately desegregate its public playgrounds and municipal recreational facilities. *Watson v. City of Memphis*, 1963, 373 U.S. . S. Ct. , L. Ed. 2d .

So that there will be no misunderstanding, we hold that the City of New Orleans must forthwith desegregate its parks, playgrounds, community centers, and all its recreational and cultural facilities and activities, includ-

[1] In *New Orleans City Park Improvement Ass'n v. Detiege*, 5 Cir., 1958, 252 F. 2d 122, 358 U.S. 54, 79 S. Ct. 99 (1958), 358 U.S. 913, 79 S. Ct. 228 (1958), the New Orleans City Park Improvement Association was permanently enjoined from denying plaintiffs and other Negroes in that matter, solely on account of their race or color, the use of the facilities of the New Orleans City Park.

ing all programs directed or supervised by the New Orleans Recreation Department. We recognize that some private groups and organizations also use public facilities. They may continue to do so as private groups or individuals, provided that the alleged privacy and claim to freedom of association are not in fact cloaks for state of city action to continue segregation of public facilities and activities. The first and primary consideration of such matters lies within the sound judgment of the single district judge to whom the case was originally assigned.

Here, as in *McCain v. Davis*, 1963, F. Supp. , it might be said there is so little substance to the constitutional questions the City raises that a three-judge court should not decide the case. In the interest of expediting justice, however, we adopt the procedure used in *McCain v. Davis*, 1963, F. Supp. ; *United States v. Manning*, 1962, W.D. La., 206 F. Supp. 623; and *United States v. Lassiter*, 1962, W.D. La., 203 F. Supp. 20.

Under the circumstances, therefore, the motion for a preliminary injunction in behalf of plaintiffs and against defendants will be issued on plaintiffs posting bond in the sum of $500.

/s/ JOHN MINOR WISDOM
UNITED STATES CIRCUIT JUDGE

/s/ HERBERT W. CHRISTENBERRY
UNITED STATES DISTRICT JUDGE

/s/ ROBERT A. AINSWORTH, JR.
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
July 31, 1963